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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 596

MICHAEL STELLA, suing on his own behalf and on behalf of all other stockholders of Kaiser-Frazer Corporation similarly situated,

Petitioner,

against

GRAHAM-PAIGE MOTORS CORPORATION and KAISER-FRAZER CORPORATION,

Respondents.

REPLY BRIEF OF PETITIONER

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We submit the following comments upon respondent's brief in opposition:

Respondent would have it thought that the petitioner is seeking to review an adverse decision of disputed facts, concurred in by the two lower courts. Such is not the case. Except by wholly undocumented assertion, respondent does not exhibit a single disputed fact in its entire brief, and there is none.

In order to create the desired appearance, respondent addresses itself hardly at all to the decision sought to be reviewed. The great bulk of the argument is

rested on the two decisions of the District Court. The first was reversed. In the second, the District Court drew certain inferences from undisputed evidence with which petitioner disagrees; but the Court of Appeals, in the decision sought to be reviewed, rejected the District Court's reasoning and accepted the view of the facts upon which petitioner is relying in this Court. On that basis, the Court of Appeals made the rulings of law which petitioner seeks to review.

The above explains why respondent devotes less than six pages of a 33-page brief to attempting to distinguish the cases cited by petitioner, which in petitioner's view present the conflicts and error sought to be reviewed.

(1) Estoppel

Respondent asserts (Br. 4) that on this issue petitioner relies on "some *supposed* representations" (our emphasis) and that the courts below expressly found "that the respondent did *not* make the representations alleged by the petitioner" (emphasis the respondent's). But these representations, set out with particularity by us (Pet. 9-16), are only reiterated and expanded by respondent at Br. 10-12. They cannot be, and are not, denied.

The issue presented is not of fact, but of law. The District Court in its first opinion, quoted extensively by respondent at Br. 6-8, reasoned that respondent's prior representations were not inconsistent with respondent's present position. The Court of Appeals, however, did not accept such reasoning. Its opinion

shows that it did consider them inconsistent,* and, on the basis of such consideration, decided the question of law which petitioner seeks to review.

That question is: The Court of Appeals having considered that respondent's prior representations and its present position are inconsistent, does its holding, that respondent is not estopped thereby, present the conflicts and error set out in our petition?

(2) Valuation

Here, again, respondent asserts that petitioner is proceeding in the face of the two-court rule (Br. 5), and even charges that, in presenting this question, petitioner has made "misstatements of fact" (Br. 19). In support, respondent argues at length as to what the District Court found (Br. 19-22) and as to what the Court of Appeals should have found (Br. 25-6).

Respondent does not point to any facts misstated by us. Nobody denies that Frazer's and Mooney's testimony dealt in glittering millions. Equally, however, is it undeniable: (a) that these witnesses expressly disclaimed that their figures referred to value in terms of a willing-buyer-willing-seller transaction

* All the opinions below hold that respondent's representations of the *cost* of the 750,000 shares of KF stock and its *profit* on the sale of the 155,000 shares made a *prima facie* case for petitioner. The District Court in so holding and at the same time accepting the argument that "profit" really did not mean profit and therefore the representations in question were not inconsistent with respondent's present position, fell into obvious error which the Court of Appeals refused to follow. It rejected the argument, which respondent repeats in this Court, (Br. p. 13), that "profit" was used in any such Pickwickian sense.

(Pet. 16); (b) that they expressly admitted that these figures referred only to special value to KF (*ibid.*); (c) that the record contains no other valuation testimony; and (d) that the Court of Appeals, in the decision sought to be reviewed, rested itself solely on "special and unique value" to KF (Pet. 22) as the proper yardstick, and even characterized petitioner's argument that this is error as "fallacy" and "underlying misconception" (Pet. 22-3).* This last, the essence of the decision sought to be reviewed, is nowhere discussed in respondent's brief.

Respondent, ignoring the above, has addressed itself to the wrong issue. The question presented is not, whether the Court of Appeals was in error in thinking that, on this record, the willing-buyer-willing-seller rule had been reached. The question is, whether petitioner's contentions as to that rule are in fact "fallacy" and "misconception," or whether they are in accord with the decisions of this Court and prior decisions of the same Court of Appeals.

* Respondents' recourse, Br. 19-21, to the District Court's alternative methods of "valuation" does not touch the above. The first method employed by the District Court, viz., using the market value of the 750,000 shares which KF gave GP for these assets, is relevant only as showing how much KF, because of the special value of the assets to it, was willing to pay for them. Reference to the *Truncali* principle (*Truncali* v. *Blumberg*, 88 F. Supp. 677, aff'd on opinion below, 2 Cir., 182 F. 2d 1021) which was the second method used by the District Court (but not mentioned by the Court of Appeals) comes to exactly the same thing: since *Truncali*, if applicable, merely justifies treating KF's purchase of assets with its own shares as if KF had paid a sum of cash equal to the market price of these shares, and such a purchase equally with the actual purchase, would have evidenced, against special value to KF because of its necessities. Thus the District Court's first two methods of valuation are not, as respondent thinks "alternative" to the yardstick of special value employed by both courts below; they merely emphasize that special value was used as the yardstick.

(3) Intracircuit Conflict

At Br. 30-32 respondent denies that such a conflict is presented on the valuation point. On the first appeal, says respondent, Judge Frank directed Judge Dimock to apply the willing-seller-willing-buyer rule and, in the absence of a market, "to look to other relevant evidence of the price which a buyer would pay." Judge Dimock looked to evidence of special value, which he thought was relevant, and the Court of Appeals agreed as to its relevance. Hence, says respondent, Judge Dimock has done just what Judge Frank told him to do.

This is untenable. In light of the cases which Judge Frank cited, discussed Pet. pp. 29-30, it is obvious that Judge Frank considered that "other relevant evidence" does not include evidence of special value. The second bench held the contrary, Pet. 22-3. The intracircuit conflict is plain.

CONCLUSION

Respondent's brief in opposition fails to controvert the conflicts and error presented in the petition. Petitioner submits that the writ should be granted as prayed.

Respectfully submitted,

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